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MAY 27 2005

No. 04-1395

IN THE

Supreme Court of the United States

LINDA ELLIS,

Petitioner,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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At the heart of this case is a Circuit split involving important issues affecting ERISA jurisprudence. This Court has recognized that ERISA was enacted as a uniform regulatory regime to protect the interests of participants in employee benefit plans and their contractually defined benefits. The rules of construction pertaining to the terms of ERISA disability insurance policies and the substantial evidence requirements of the standard of review are vital components of that uniform regulatory regime that affect the millions of ERISA insureds who have purchased disability insurance coverage through their employers. The uniform application of these components is also vital to the "full and fair review" that is required to be given to disability claims under ERISA insurance policies.

In its Brief, Liberty Life has ignored these principles and attempted to misdirect the Court's attention with a combination of diversionary arguments about irrelevant factual disagreements, and strained efforts to evade or explain away serious intercircuit conflicts on these important issues. These arguments are unavailing.

Liberty Life has also incorrectly suggested that it is free to adopt any construction of "Disability" it chooses, without regard to any opinion of any federal court or any other standard. (Brief Opp. at 9). Liberty Life apparently bases this argument on its new conclusion that this case presents "nothing more than a run-of-the mill insurance dispute". (Brief Opp. at 1). Liberty Life has also incorrectly suggested the Petitioner should be "lobbying the State" legislature, if she wants to change the way Liberty Life is regulated. (Brief Opp. at 21).

Besides conflicting with the arguments Liberty Life made about ERISA and ERISA preemption below, these arguments demonstrate that Liberty Life wholly fails to appreciate the purposes of ERISA. Apparently, Liberty Life feels that ERISA should only apply when it benefits insurers, and it is otherwise free to ignore ERISA's purpose to protect participants and the contractually defined benefits they purchase in ERISA disability insurance benefit plans.

This Court's review of these important issues is imperative.

A. There is a Direct Circuit Split Regarding the Construction of an ERISA Disability Insurance Policy.

This Court has recognized that ERISA was enacted to provide a "uniform regulatory regime" to protect the interests of participants in employee benefit plans and protect contractually defined benefits. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488, 2495, 159 L. Ed. 2d 312, 326 (2004); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 (1985). The uniform construction of terms such as "Disability" in ERISA insurance policies is a vital component of that uniform regulatory regime. It is consistent with the "full and fair" review that is to be given to disability benefit determinations under ERISA, and the federal common law Congress "expected" courts would develop. *The Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830-31 (2003); *Bruch*, 489 U.S. at 110; *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 56 (1987). It is also consistent with the trust-based fiduciary model this Court has recognized is applicable under ERISA. *Davila*, 542 U.S. 200, 124 S. Ct. at 2504, 159 L. Ed. 2d at 337 (Ginsburg, J., dissenting); *Bruch*, 489 U.S. at 110.

The serious and direct conflict between the majority decision of the Fifth Circuit in this case and the decisions of the Second, Seventh, Ninth, Tenth and Eleventh Circuits regarding the construction of "Disability" definitely impacts ERISA's uniform regulatory regime. The resolution of this conflict should not be avoided or explained away with suggestions that there are variances in the policy language, differences between "any occupation" and "own occupation" disability provisions, or differences in facts.

If ERISA's purpose to protect contractually defined benefits has any meaning at all, the standard for construing "Disability" under ERISA should be the same in every Circuit. Simply stated, this Court should review this case, so ERISA participants and ERISA insurers will know whether "Disability" will be

construed using the common sense, practical construction adopted by the Second, Seventh, Ninth, Tenth and Eleventh Circuits, or the overly restrictive impossible construction adopted by the Fifth Circuit majority in this case.

Under the common sense, practical construction of "Disability", an ERISA insured who is unable to perform one or more of the duties that are vital or essential to her occupation is "Disabled" and entitled to disability benefits. *Caldwell v. Life Insurance Company of North America*, 287 F.3d 1276, 1285-86 (10th Cir. 2002); *Kinstler v. First Reliance Standard Life Insurance Company*, 181 F.3d 243, 253 (2d Cir. 1999); *McClure v. Life Insurance Company of North America*, 84 F.3d 1129, 1133-34 (9th Cir. 1996); *Hammond v. Fidelity and Guaranty Life Insurance Company*, 965 F.2d 428, 431 (7th Cir. 1992); *Torix v. Ball Corporation*, 862 F.2d 1428, 1430-31 (10th Cir. 1988); *Helms v. Monsanto Company, Inc.*, 728 F.2d 1416, 1420 (11th Cir. 1984). Under the Fifth Circuit's overly restrictive impossible construction, an ERISA insured who can perform only one of the vital or essential duties of an occupation is not entitled to recover disability benefits, even if she cannot perform the occupation on an eight hour a day, five day a week basis. (App. A at 16a-17a).

This conflict is obvious, it is serious, and it can only be resolved by this Court. This conflict must be resolved by this Court, or thousands, possibly hundreds of thousands, of disabled ERISA insureds will be in severe jeopardy of having their disability claims summarily denied or terminated by insurers like Liberty Life using an overly restrictive construction of "Disability". Such a result is hardly consistent with the protection ERISA is supposed to provide to contractually defined disability benefits these ERISA insureds have purchased.

B. The Fifth Circuit Completely Disregarded the Substantial Evidence Requirement

Liberty Life's continued efforts to "spin" its unequivocal determination that Ellis was "Disabled" in May 2000 are unavailing. Contrary to its argument that it was "investigating"

Ellis' eligibility for LTD benefits and gratuitously paid her during that "investigation", Liberty Life clearly stated:

> . . . ***it is apparent you were ill and met the criteria*** for your policy's definition of disability initially based on the medical information received, ***you no longer meet*** your Long Term Disability Policy's definition of disability.

(App. B at 38a) (emphasis added). Liberty Life terminated the LTD benefits Ellis qualified for in May 2000, because Liberty Life felt she was "no longer" "Disabled" in December 2000.

Although Liberty Life now argues that there was "substantial evidence" that supported its termination decision, the Fifth Circuit failed to identify any evidence that supported any determination that Ellis was able to perform any material, vital or essential duty of her occupation. Indeed, none of the "evidence" generically referenced in Liberty Life's Brief satisfies that requirement. (Brief Opp. at 20).

All of the medical evidence from Ellis' treating physicians in the administrative record from January 2000 through March 2001 supported the District Court's finding of "Disability". These physicians determined that:

1. Ellis had a Class 4 Physical Impairment and a Class 4 Mental Impairment attributable to the persistent pain she was suffering;
2. She could not work an eight hour day;
3. She could not perform on the job driving;
4. She could not travel in a vehicle more than thirty minutes without pain medication;
5. She was unable to walk or stand for any significant length of time;
6. She could not lift, push, pull, climb stairs, or make fine movements with her hands;
7. She had memory and cognitive problems attributable to her pain;
8. She had difficulty sleeping and grooming herself;

9. She could not manage financial matters;
10. She suffered multiple areas of pain on palpation;
11. She suffered significant fatigue;
12. She met the recognized diagnostic criteria for fibromyalgia;
13. The results of her EMGs were suggestive of a myopathic process; and
14. The results of a muscle biopsy were also suggestive of an inflammatory myopathy.

None of this evidence supported a conclusion that Ellis was "no longer" "Disabled" in December 2000.

In November 2000, Liberty Life's selected expert, Dr. Croft, reported:

1. He was "uncertain" whether Ellis could stand, walk, squat, bend, kneel, climb stairs, perform on the job driving, push, pull, reach, perform repetitive movements, grasp, or perform fine finger dexterity.
2. He "cannot define this patient's limitations".
3. An FCE may be helpful.
4. Ellis became almost tearful and complained of pain upon palpation of her shoulder and thigh muscles, she had a decreased sensory response to pin prick in her hands, she had slow finger to nose testing because of pain.
5. Her gait appeared somewhat antalgic.
6. She had "possible" fibromyalgia, but he was not qualified to comment on that diagnosis.
7. He thought a repeat EMG would be helpful.
8. He thought an evaluation by a rheumatologist would also be helpful.

Dr. Croft's report and records are hardly "substantial evidence" that Ellis was "no longer" "Disabled" in December 2000. The District Court found Dr. Croft's records and opinion were not credible, substantial or positive evidence at all. (App. B. at 46a-

47a). The Fifth Circuit majority did not discuss or comment on this District Court finding in its opinion.

The information from private investigators that Liberty Life references in its Brief was videotape surveillance of fifteen minutes edited from two days of tape showing Ellis carrying grocery bags and moving a water sprinkler. The District Court found the videotape surveillance was no evidence and was inadmissible, because it did not demonstrate Ellis could perform any of the material duties of her occupation. (App. B at 44a-45a). The Fifth Circuit majority failed to comment on the District Court's ruling excluding this evidence, and certainly did not describe it as "substantial evidence" in its opinion below.

On October 17, 2000, Susan McCormack, RN, a nurse employed by Liberty Life, noted that Ellis met the criteria for the diagnosis of polymyocitis. According to Nurse McCormack, Ellis demonstrated the following diagnostic criteria of myositis/ myopathy: proximal muscle weakness, elevated CPK, myogenic changes on EMG, and non-destructive arthalgias. The notes made by Liberty Life's nurse are not "substantial evidence" that Ellis was "no longer" "Disabled" in December 2000.

The information Ellis provided included a Liberty Life Activities Questionaire, and the Social Security Administration's April 12, 2001 decision that she was "Disabled" as of October 29, 1999. This evidence also demonstrated that Ellis had numerous difficulties with daily activities, including: difficulty walking, an inability to climb stairs, an inability to wash floors, clean bathrooms, vacuum, change bed linens, or wash her car; a limited ability to drive her car for only thirty minutes usually only after taking pain medication; difficulty sleeping, sitting and standing; an inability to exercise; an inability to manage her finances; memory problems; problems even combing her hair, opening jars, and holding a pen; and significant fatigue. The Social Security Administration specifically found Ellis could not perform her occupation as a mortgage loan officer and she did not have the residual functional capacity to perform even sedentary work on a sustained basis. This is evidence that

Ellis was "Disabled" in December 2000. It is not evidence that supports Liberty Life's decision she was "no longer" "Disabled".

There is no other "evidence" in the administrative record. None of this evidence supported Liberty Life's decision to terminate Ellis' LTD benefits in December 2000. In this context, the Fifth Circuit majority's generic references to "subsequent medical evidence" and "substantial evidence" in its opinion lack substance and support. The implication of the Fifth Circuit's majority opinion is that a "self-interested" ERISA insurer, like Liberty Life, need not specifically document or identify the evidence that it contends is support for its decision to terminate disability benefits it has been paying to an ERISA insured. Of course, such a holding is inconsistent with the "full and fair review" ERISA mandates to protect the contractually defined benefits of participants in employee benefit plans.

This ruling is also clearly inconsistent with the abuse of discretion standard of review recognized by every other Circuit. *Stup v. Unum Life Insurance Company of America*, 390 F.3d 301, 307-08 (4th Cir. 2004); *Kosiba v. Merck & Company*, 384 F.3d 58, 69 (3rd Cir. 2004); *Fought v. Unum Life Insurance Company*, 379 F.3d 997, 1014-15 (10th Cir. 2004); *McDonald v. Western-Southern Life Insurance Company*, 347 F.3d 161, 169-70 (6th Cir. 2003); *Hawkins v. First Union Corporation Long-Term Disability Plan*, 326 F.3d 914, 919 (7th Cir. 2003); *Cook v. Liberty Life Assurance Company of Boston*, 320 F.3d 11, 19, 23 (1st Cir. 2003); *Caldwell v. Life Insurance Company of North America*, 287 F.3d 1276, 1282-83 (10th Cir. 2002); *Levinson v. Reliance Standard Life Insurance Company*, 245 F.3d 1321, 1325-27 (11th Cir. 2001); *House v. The Paul Revere Life Insurance Company*, 241 F.3d 1045, 1048 (8th Cir. 2001); *Pinto v. Reliance Standard Life Insurance Company*, 214 F.3d 377, 392 (3rd Cir. 2000); *Zavora v. Paul Revere Life Insurance Company*, 145 F.3d 1118, 1122-23 (9th Cir. 1998); *Woo v. Deluxe Corporation*, 144 F.3d 1157, 1162 (8th Cir. 1998); *Donaho v. FMC Corporation*, 74 F.3d 894, 899-900 (8th Cir. 1996). It is also inconsistent with this Court's recognition that an ERISA

insurer may not refuse to credit an ERISA insured's reliable medical evidence. *Nord*, 538 US at 834. This Court should also review this case to address these obvious conflicts.

C. Review by this Court is Necessary Because the Fifth Circuit's Majority Opinion is Wrong

In its Brief, Liberty Life erroneously argues that the decision of the Fifth Circuit's majority was "right" and the same result would occur in every other Circuit. Yet, it certainly appears the District Court's construction of "Disability" would have likely been affirmed in the Second, Seventh, Ninth, Tenth and Eleventh Circuits, because it was a practical common sense construction that served ERISA's purpose of protecting the rights of participants and their contractually defined benefits.

Additionally, the District Court's finding that Liberty Life abused its discretion and violated ERISA when it terminated Ellis' LTD benefits would have likely been affirmed in the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits, because there was no concrete evidence in the administrative record that supported Liberty Life's decision. It is unlikely that any other Circuit would have reached the same conclusion as the Fifth Circuit majority on this record.

It is also significant that the Fifth Circuit majority wholly failed to even mention *Lain v. Unum Life Insurance Company of America*[1] in its opinion. It is clear the Fifth Circuit panel in *Lain* rejected the "each and every" construction the Fifth Circuit majority adopted in this case. This significant omission cannot be squared with any of the unavailing "reasons" Liberty Life has advanced in its Brief.

Liberty Life's argument that the disability provisions in *Lain* and this case are "nothing alike" strains credibility. (Brief Opp. 17). In *Lain*, the LTD policy contained the following language:

"Disability" and "disabled" mean that because of injury or sickness:

1. [the insured] cannot perform each of the material duties of [her] regular occupation; or

[1] 279 F.3d 337, 344-45 (5th Cir. 2002).

2. [the insured] while unable to perform all of the material duties of [her] occupation on a full-time basis, [is]:
   a. performing at least one of the material duties of [her] regular occupation or another occupation on a part-time or full-time basis, and
   b. earning currently at least 20% less per month than [her] indexed pre-disability earnings due to that same sickness or injury.

Lain, 279 F.3d at 343-44.

The only possible distinction between the *Lain* definition of "Disability" and the Liberty Life definition of "Disability" is use of the terms "each" and "all" in the respective policies. This "distinction" is not significant; both terms are easily interchangeable in this context. There is no way this" distinction" justifies the Fifth Circuit majority's wholesale refusal to even acknowledge *Lain*.

The Fifth Circuit panel in *Lain* would have likely found Ellis was "Disabled", because she was clearly unable to perform one or more of the material duties of her occupation. 279 F.3d at 345-46. Yet, the Fifth Circuit majority determined Ellis was not "Disabled", because she did not prove she was unable to perform "every single" material duty of her occupation. (App. A at 16a-17a).

These are two totally opposite constructions of very similar, not dissimilar, language. One of these constructions must be wrong. The *Lain* panel's opinion is clearly consistent with the opinions of five other Circuits on this issue, and the Fifth Circuit's majority opinion in this case is not.

Liberty Life further demonstrated its lack of credibility in attempting to "distinguish" *Lain* by incorrectly suggesting *Lain* "never discussed the propriety of an 'each and every' standard" for "Disability". (Brief Opp. at 16). In *Lain*, the insurer, Unum, asserted that Lain was not disabled because she did not prove "she was unable to perform *all* of her material duties as an attorney". 279 F.3d at 344-45. The Fifth Circuit determined that Unum's asserted construction was "inconsistent with a fair

reading of the policy", and "a fair reading of the policy" only required that Lain prove she was "unable to perform only a single material duty of her occupation". 279 F.3d at 345-46. *Lain* not only discussed the impropriety of an "each and every" construction like that advanced by the Fifth Circuit majority and Liberty Life in this case, it specifically rejected such a construction.

The Fifth Circuit's majority opinion also ignored the well-recognized principle that ambiguities must be construed against the ERISA insurer, and in favor of the reasonable expectations of the ERISA insured. *Lifson v. INA Life Insurance Company of New York*, 333 F.3d 349, 353 (2d Cir. 2003); *Bynum v. Cigna Healthcare of North Carolina*, 287 F.3d 305, 313 (4th Cir. 2002); *Lain*, 278 F.3d at 345; *Perez v. Aetna Life Insurance Company*, 150 F.3d 550, 556-57 (6th Cir. 1998); *McClure*, 84 F.3d at 1133-34. In the Second, Fourth, Sixth and Ninth Circuits, this rule of construction would likely result in the District Court's decision being affirmed, not reversed. The Fifth Circuit's majority was wrong when it ignored this well-recognized rule of construction.

There is no evidence in the record that supports the Fifth Circuit majority's opinion that Liberty Life's termination of Ellis' LTD benefits was supported by substantial evidence. The overwhelming evidence in the record established that Ellis was disabled from her occupation in December 2000. The correct construction of "Disability" was the construction adopted by the District Court, not the Fifth Circuit's majority. The District Court's Judgment would likely have been affirmed in every other Circuit, it would likely have been affirmed by the panel of the Fifth Circuit that authored *Lain*, and it should have been affirmed by the Fifth Circuit panel that heard this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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